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No. 75-1590

# In the Supreme Court of the United States

OCTOBER TERM, 1976

ORLANDO MIRANDA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-28a) is reported at 526 F. 2d 1319.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on December 3, 1975, and a petition for rehearing with suggestion for rehearing en banc (Pet. App. 1a-3a) was denied on April 8, 1976. The petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to strike two witnesses' testimony because of the government's inadvertent loss of disclosable evidence.

2. Whether the district court erred in not requiring disclosure of the identity of an acquaintance of a government informant and in refusing to give a "missing witness" instruction.

3. Whether the district court erred in admitting evidence of similar acts petitioner committed.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of cocaine with intent to distribute and of distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 812. He was sentenced to concurrent terms of six years' imprisonment, to be followed by four years' special parole. The court of appeals affirmed in a comprehensive opinion (Pet. App. 5a-28a).

As summarized by the court of appeals (Pet. App. 6a-10a), the evidence showed that on March 22, 1974, petitioner told government informant Gloria Rodas that he would sell her 10 1/2 ounces of cocaine for $10,000. On March 25, 1974, agents of the Drug Enforcement Administration (D.E.A.) searched Rodas and her car, equipped her with an electronic radio transmitter, and furnished her with $6,000 in bills whose serial numbers had been pre-recorded. The agents followed Rodas to her meeting with petitioner at the latter's cocktail lounge. Upon her arrival, petitioner asked her to drive him to a nearby auto body shop.

During the trip, petitioner told her in Spanish that he had the cocaine with him. When Rodas explained that she had only $6,000 in her possession, petitioner agreed to give her the entire quantity of cocaine and extend her credit for the balance. Petitioner then placed a packet of cocaine in an attache case on the back



seat of the car and withdrew the money. Their conversation was transmitted to the D.E.A. agents, who recorded it on a tape cassette. After Rodas left petitioner at the auto shop, she drove to an appointed rendezvous with the surveillance agents, who removed the cocaine from the attache case.

On April 2, 1974, D.E.A. agents again searched Rodas, furnished her with a transmitter, and gave her $4,000 in pre-recorded bills to pay petitioner for the cocaine. The payoff was duly recorded by the surveillance agents.

On May 8, 1974, Rodas introduced undercover narcotics agent Pinol to petitioner as her brother. Pinol thanked petitioner for the favor he had done his sister and requested that petitioner supply him with a kilogram of cocaine. Petitioner refused to do so, claiming that he was getting out of the business.

At trial, D.E.A. agents McMullan and Schnackenberg corroborated Rodas' testimony concerning the March 25, 1974, purchase, which they had kept under continuous surveillance from their car. They also testified that they had heard the conversation in Spanish between Rodas and petitioner clearly as it was being recorded and that D.E.A. agent Castillo had provided them with a running translation of it. Castillo's testimony supported Rodas' version of the March 25 transaction.

Castillo also testified that when the agents returned to the D.E.A. office after the March 25 meeting, he had listened to approximately three minutes of the recording (Pet. App. 12a). But when Schnackenberg looked for the cassette a day or two later to have it transcribed in accordance with the usual practice, the recording had disappeared. Despite the agents' repeated and conscientious attempts to locate the cassette, both at the time of its loss and shortly before trial, the recording was never found (Pet. App. 13a).

The defense moved to suppress Rodas' and Castillo's testimony concerning the March 25 conversation on the grounds that the recording had been lost by the government and that the prosecution had failed to reveal that such a recording had been made until the second day of trial. The court permitted petitioner to recall agent Schnackenberg and to cross-examine Castillo and McMullan at length before the jury concerning the missing tape (Pet. App. 12a). The circumstances of the loss of the tape and the efforts made to find it were thoroughly presented to the jury. The defense did not request that any further inquiry be conducted concerning the contents of the tape or the circumstances of its loss (Pet. App. 13a).

The district court found that while the loss of the tape "indicates negligence on the part of the government agents, the Court cannot find that the loss was intentional or in bad faith * * * " (Pet. App. 20a). It held that the absence of the tape did not deprive petitioner of a fair trial and refused to suppress the witnesses' testimony (Pet. App. 23a). Defense counsel fully utilized the testimony concerning the nature of the tape and its loss in cross-examining the government agents and in his closing argument (Tr. 137, 355, 361, 367), and the jury was instructed that it could consider all such evidence (Tr. 403-404).

The court of appeals upheld the district court's finding that the loss of this evidence was "merely inadvertent or negligent" and affirmed (Pet. App. 21a).

## ARGUMENT

1. Petitioner contends (Pet. 20) that his conviction should be reversed and the indictment dismissed because of the loss of the recording and the government's failure to disclose its making and loss until the second day



of trial. However, as the court of appeals correctly noted (Pet. App. 19a), the courts "have refused to impose sanctions where the loss [of disclosable evidence] was inadvertent and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial." See *United States* v. *Augenblick*, 393 U.S. 348; *United States* v. *Rojas*, 502 F. 2d 1042, 1044-1045 (C.A. 5); *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S. 916; *United States* v. *Shafer*, 445 F. 2d 579, 581-582 (C.A. 7), certiorari denied, 404 U.S. 986. Here, as shown above, that evidence demonstrated that the loss of the tape was inadvertent—the result of negligence and not of deliberate wrongdoing—and that strenuous efforts were made to locate it.

The unavailability of the tape did not so prejudice the defense as to require either suppression of the evidence or dismissal of the indictment. The government's case against petitioner was strong (Pet. App. 22a). In addition to Rodas' testimony, it included the visual observations of the surveillance agents, the discovery of cocaine in Rodas' car after her meeting with petitioner, the agents' careful pre-encounter searches to eliminate the possibility that Rodas might have obtained the cocaine from another source, and Pinol's corroborative testimony. Moreover, unlike most cases involving governmental failure to produce disclosable evidence, the significance of the loss of the tape and the inferences to be drawn from its unavailability were fully argued before the jury.

Under these circumstances, the district court correctly concluded that the absence of the tape did not affect petitioner's substantial rights, and the court of appeals affirmed that finding (Pet. App. 23a). That decision is correct and does not warrant further review. See *United*

*States* v. *Johnson*, 327 U.S. 106, 112; *Mesarosh* v. *United States*, 352 U.S. 1, 9; cf. *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.

2. Petitioner contends (Pet. 28-31) that the district court erred in not requiring the government to disclose the identity of two women, "Georgie" and "Toni"; in denying a continuance once the identity of one of the women became know during trial; and in not giving a "missing witness instruction" concerning the other woman.

a. As the court of appeals pointed out (Pet. App. 26a), the record shows that although they may have been elsewhere in the lounge at the time, the two women were never present at conversations between Rodas and petitioner concerning narcotics. Thus, neither woman was a material witness for either the prosecution or the defense, because the fact that Rodas met petitioner at his lounge was not in issue.

At petitioner's request, the prosecution produced "Georgie" and informed the defense that she had pleaded guilty to a narcotics conspiracy charge and was cooperating with the government. After interviewing "Georgie," the defense declined to call her as a witness (Pet. App. 25a). Nothing in the record indicated that the other woman, "Toni," had any relationship with the government, and the courts below accepted the government's representation that it had no control over her or any knowledge of her whereabouts (*ibid.*). Thus, the district court properly did not require the government to disclose her identity (Pet. App. 26a).[1]

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[1]Nor did the trial court err in refusing to instruct the jury that it could infer from the prosecution's failure to call the two women to testify that their testimony would have been adverse to the government. Since the testimony of the women would not have been material to any of the issues at trial, the court properly gave the following general instructions, to which petitioner did not object (Pet. App. 27a):

> [I]f it is specially within the power of the prosecution or defense to produce a witness who could give material testimony on an issue or to produce other evidence, the failure to call the witness may give rise to an inference that the evidence would be unfavorable.
>
> You cannot draw any such inference with regard to a witness or exhibit that is equally available to both parties or where the witness' testimony would be merely cumulative.



b. The decision whether to grant a continuance is within the discretion of the district court. See, *e.g.*, *Hemphill* v. *United States*, 392 F. 2d 45, 48-49 (C.A. 8), certiorari denied, 393 U.S. 877. As the court of appeals properly found (Pet. App. 25a-26a), petitioner did not show that Georgie's testimony would have aided his defense. Under these circumstances, the district court's refusal to grant a continuance was not reversible error. See *United States* v. *Conder*, 423 F. 2d 904, 908-909 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958.[2]

3. Petitioner also contends (Pet. 32) that the trial court erred in admitting testimony of his conversation with D.E.A. agent Pinol, which occurred approximately one month after the narcotics transaction for which he was convicted. Evidence of other crimes, however,

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[2]*United States* v. *Baum*, 482 F. 2d 1325 (C.A. 2), upon which petitioner relies (Pet. 28-29), merely established that the defense was entitled to a continuance in order to prepare to meet the testimony of a crucial prosecution witness whose identity was not revealed until he testified. In this case, on the other hand, Georgie was not called as a government witness, and there is no indication that her testimony would be relevant to petitioner's guilt or innocence.

is admissible where, as here, such events are proximate in time to the charges at issue and are relevant to prove, *inter alia*, intent, motive or absence of mistake (Pet. App. 28a). See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 560-562; *Sherman* v. *United States*, 356 U.S. 369, 375; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; Fed. R. Evidence 404(b). As the court of appeals correctly held (Pet. App. 28a), petitioner's conversation with Pinol was relevant to his intent to possess and distribute cocaine and was properly admitted under a limiting instruction that the jury could consider that evidence only "as bearing on [petitioner's] intention in connection with the March 25th charge."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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